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Re: Draft Report of the CON Task Force

Dear Pam:

I have reviewed the draft report of the CON Task Force and offer the following comments:

1. I was surprised and disappointed by how little discussion there is of the reasons for the Task Force's recommendations, or the extent of stakeholders' dissatisfaction with the current process. It is not, I believe, adequate to rely on the fact that the reasons can be found in the minutes of the Task Force meetings, as it is unrealistic to expect that a Commissioner who has a question about a particular recommendation will search through 100+ pages of minutes in search of the underlying rationale.

The absence of an articulated justification for the Task Force's recommendations is not particularly significant if the Staff intends to advocate for those recommendations when they are presented to the full Commission. However, to the extent the Staff will be arguing against the recommendations, the failure to include supporting arguments in the report seems likely to reduce the report's credibility and, frankly, suggests that the Task Force process was superficial, rather than the relatively thoughtful and deliberate process I believe it was.

2. The draft does not accurately capture the Task Force's recommendation regarding shell space. The draft (page 10) says that policies permitting shell space should be adopted as part of a revision of the Acute Inpatient Services chapter of the State Health Plan. I do not believe the Task Force would object to the inclusion of policies to that effect in a revised State Health Plan chapter, but that is not the process the Task Force recommended.

As was discussed at the meeting, the policy against the construction of shell space is just that – a policy, not part of the State Health Plan. (In fact, as I mentioned at one of the meetings, I don't believe the policy was ever formally adopted by the Commission.) Given that it has no regulatory standing, it can be changed at any time without the need for formal rulemaking. The

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Task Force believed that changing the policy against shell space would be of immediate benefit to both payors and providers, and its recommendation was that it should be modified right away, prior to – and independent of – a future review of the State Health Plan.

The report also fails to capture a second aspect of the Task Force's recommendation concerning shell space. As you know, the Staff has been applying the policy against construction of shell space not only in reviewing CON applications, but also in reviewing requests for determinations of noncoverage. The Task Force's recommendation was intended to apply to determinations of noncoverage as well as to formal CONs. That is, the Task Force recommended ending the current practice of refusing to issue a determination of noncoverage for otherwise qualifying projects that include some shell space. This should be made clear in the final report as well.

3. The draft report does not, I believe, accurately capture the Task Force's recommendations regarding the 140% rule. The draft (page 11) says that the "Task Force recommends that the Commission study alternatives to the 140% rule for establishing licensed acute care bed capacity." In fact, I believe the Task Force's real concern is with the inconsistency between the 140% rule and the occupancy assumptions contained in the current State Health Plan chapter. Apart from that problem, many – perhaps most – of the Task Force's members saw no problem with the 140% rule. It is only in the context of addressing the inconsistency between the occupancy assumptions and the 140% rule that the need to consider alternatives to the rule found significant support.

Thank you in advance for your consideration of these comments. I look forward to seeing you on Thursday.

Sincerely yours,

Joel I. Suldan

cc: Task Force Members  
Rex Cowdry, M.D.